ORIGINAL

No. 87-5259

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director, Department of Corrections and MICHAEL O'LEARY, Warden

Respondents.

CERTIFICATE OF SERVICE AND STATEMENT OF TIMELY FILING

I, TERENCE M. MADSEN, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

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I further state that this mailing took place on August 26, 1987, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: _____
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SUBSCRIBED and SWORN to
before me this 26th day of
August, 1987.

_____
NOTARY PUBLIC

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's sixth and fourteenth amendment rights to a jury drawm from a fair cross-section of the community requires an examination of the prosecutor's use of his peremptory challenges in the selection of a petit jury.
2. Whether the decision in Batson v. Kentucky controls in that this case was final to the date of the decision in Batson.
3. Whether petitioner's failure to raise a claim in state court premised upon the decision in Swain v. Alabama precludes review of the claim.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at Teague v. Lane, 820 F.2d 832 (7th Cir. 1987) (en banc). The opinion has been submitted to this Court as Appendix C to the Petition for Writ of Certiorari, and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Frank Dean Teague, was convicted of three counts of attempt murder, and two counts of armed robbery following a jury trial in the Circuit Court of Cook County, Illinois. Petitioner was sentenced to concurrent terms of imprisonment of 30 years on each count.

Petitioner appealed his convictions to the Illinois Appellate Court and claimed, inter alia, that due process and the right of petitioner to a trial by a fair and impartial jury were violated by the State utilizing its peremptory challenges to exclude black veniremen. The court affirmed the convictions. People v. Teague, 108 Ill. App. 3d 891, 439

N.E.2d 1066 (1st Dist. 1982). A petition for leave to appeal was denied by the Illinois Supreme Court. People v. Teague, 93 Ill.2d 547, 449 N.E.2d 820 (1983). This Court denied a petition for writ of certiorari. Teague v. Illinois, 464 U.S. 867 (1983).

Subsequently, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division. Petitioner claimed that his Sixth and Fourteenth Amendment rights were violated when the prosecutor used his peremptory challenges to exclude black veniremen. The district court denied petitioner habeas corpus relief.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit and claimed that this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965) be re-examined. On April 9, 1985 the case was argued before a panel of the court. Pursuant to Circuit Rule 16(e) the panel opinion was circulated to the judges of the court and a majority of the judges voted to rehear the case en banc. United States ex rel. Teague v. Lane, 779 F.2d 1332 (7th Cir. 1985). The rehearing en banc was postponed until this Court announced its decision in Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), which was pending before this Court when the vote was taken to rehear the case en banc. Following rehearing of the case en banc, the court affirmed the denial of a writ of habeas corpus and held: (1) Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986) precluded retroactive application of the decision in Batson; (2) even assuming the claim made pursuant to Swain v. Alabama was not procedurally defaulted by Wainwright v. Sykes, 433 U.S. 72 (1977), petitioner did not make a sufficient showing of an equal protection violation; and (3) the Sixth Amendment fair cross-section requirement was inapplicable to the petit jury. Teague v. Lane, 820 F.2d 832 (7th Cir. 1987) (en banc). Petitioner now seeks to have this Court review the decision of the Seventh Circuit.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondents respectfully request this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

I.

PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY DOES NOT REQUIRE AN EXAMINATION OF THE PROSECUTOR'S USE OF HIS PEREMPTORY CHALLENGES IN THE SELECTION OF A PETIT JURY.

Initially, petitioner contends that "the prosecutor's racially discriminatory use of its [peremptory] challenges violated his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community." (Petition for Writ of Certiorari at 6) The court below held that insofar as "the sixth amendment requires only that a jury be impartial, we refuse to extend the fair cross-section requirement to require that the petit jury trying a criminal defendant reflect a fair cross-section of the community wherein the trial takes place." Teague v. Lane, 820 F.2d 832 (1987). Respondents maintain the court below properly reviewed and correctly decided the issue where the Court relied on decisional law of this Court.

In Taylor v. Louisiana, 419 U.S. 522 (1975), this Court recognized the principle that the sixth amendment requires trial by a jury drawn from a fair cross-section of the community. However, this Court did note that "[i]t should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the community and thereby fail to be reasonably representative thereof." Id. at 538. In view of this specific language it is apparent that the sixth amendment does not control the process of selecting a petit jury and can impose no requirements on a prosecutor's exercise of his peremptory challenges.

Moreover, most recently in Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758 (1986), this Court held that the "fair cross-section" requirement did not prevent trial before a "death-qualified" jury. Specifically, this Court remarked, "[w]e have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." Id. at ___, 106 S.Ct. at 1764. A reasonable reading of Lockhart suggests that this Court need not examine the issue with respect to the fair cross-section requirement and a prosecutor's exercise of his peremptory challenges.

The court below in its opinion made clear that its decision was controlled by and did not depart from decisions of this Court:

> Contrary to Teague's assertion that the Supreme Court decisions in Williams [v. Florida, 399 U.S. 78 (1970)] and Apodoca v. Oregon, 406 U.S. 404 (1972), require us to apply the fair cross-section requirement to the petit jury, those decisions, as well as the decisions in Ballew [v. Georgia, 435 U.S. 223 (1978)] and Burch v. Louisiana, 441 U.S. 130 (1979), require only that the jury selection process provide for the "possibility" that the jury empanelled reflect a fair cross-section of the community. The decisions of the Supreme Court make clear that absent a pattern of systematic exclusion of a particular class from the petit jury, no constitutional wrong has occurred.

Teague v. Lane, 820 F.2d 832, 838 (7th Cir. 1987) (en banc). Where the court below fully addressed and correctly decided petitioner's claim, this Court should refuse to grant petitioner's request for a writ of certiorari.

II.

THE DECISION IN BATSON v. KENTUCKY DOES NOT CONTROL IN THAT THIS CASE WAS FINAL PRIOR TO THE DATE OF THE DECISION IN BATSON.

Petitioner also claims that this Court's decision in Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986) should be

applied retroactively to his conviction which was not final at the time the petition for a writ of certiorari was denied in McCray v. New York, 461 U.S. 961 (1983). (Petition for Writ of Certiorari at 8) Respondents submit petitioner's application for a writ of certiorari with respect to this claim should be denied in that this Court's decision in Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986) precludes the retroactive application of the Batson decision to this case.

In Allen v. Hardy, decided June 30, 1986, just two months after the decision in Batson, this Court held that Batson did not apply "retroactively on collateral review of convictions that become final before our opinion [in Batson] was announced." Allen v. Hardy, ___ U.S. ___, ___, 106 S.Ct. 2878, 2880 (1986). This Court further explained the scope of its decision by stating:

> By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Batson v. Kentucky.

Id. at 2880 n. 1.

In the case at bar, petitioner's conviction was affirmed by the Illinois Appellate Court on August 30, 1982. People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1st Dist. 1982). The Illinois Supreme Court denied leave to appeal on April 21, 1983. People v. Teague, 93 Ill.2d 547, 449 N.E.2d 820 (1983). This Court subsequently denied his petition for a writ of certiorari on October 3, 1983. Teague v. Illinois, 464 U.S. 867 (1987). Thus, petitioner's case was final at the time this Court announced its decision in Batson, on April 30, 1986. Respondents maintain that Allen v. Hardy resolves the issue, and this Court need not reexamine its very recent decision.

III.

PETITIONER'S FAILURE TO RAISE A CLAIM IN STATE COURT PREMISED UPON THE DECISION IN SWAIN v. ALABAMA, PRECLUDES REVIEW OF THE CLAIM.

Finally, petitioner argues that "he is entitled to relief from his conviction because the record establishes an equal protection violation pursuant to Swain v. Alabama, 380 U.S. 202 (1965)." (Petition for Writ of Certiorari at 11) Respondents maintain this Court should deny the petition for writ of certiorari as to this claim where petitioner did not raise a Swain claim in the state court, and therefore, he was procedurally barred from advancing the claim by way of a petition for writ of habeas corpus pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977).

Moreover, the substance of petitioner's claim is without merit. Petitioner did not claim below in state court or in the district court that the prosecution had engaged in the systematic exclusion of blacks from petit juries in case after case. Thus, petitioner failed to advance the issue under the analysis articulated by this Court in Swain.

CONCLUSION

In view of the foregoing reasons, respondents respectfully request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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